Filed 3/18/09 Perelmutter v. Impex Trading CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DANIEL B. PERELMUTTER, Plaintiff and Appellant, v. IMPEX TRADING CORPORATION et al. Defendants and Respondents.	B200953 (Los Angeles County Super. Ct. No. BC324440)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Thornton House, Judge. Affirmed.

Steiner & Libo and Leonard Steiner for Plaintiff and Appellant.

Darling & Risbrough and Robert C. Risbrough for Defendants and Respondents.

Daniel B. Perelmutter (Perelmutter) appeals from the judgment against him on his personal injury complaint alleging he was rear-ended by a dump truck, and also the denial of his motion for new trial. Perelmutter contends: (1) there was insufficient evidence to demonstrate that the driver of the dump truck, Jose L. Flores (Flores), was neither negligent nor the cause of the accident; (2) the trial court improperly failed to give a negligence per se instruction even though Flores was driving the dump truck in excess of the statutory weight limit; (3) it was unfair that Flores and his employer, Impex Trading Corporation (Impex), were allowed to elicit opinion evidence from California Highway Patrol Officer Steven Aranda but Perelmutter was not; (4) despite a prior order to the contrary, the trial court allowed Flores and Impex to read excerpts to the jury from Perelmutter's prior personal injury actions and then argued in closing argument that he had a pattern and practice of suing; and (5) the trial court erred when it denied Perelmutter's motion for a new trial.

We find no error and affirm.

FACTS

Background

From 1963 to 2003, Perelmutter suffered a series of injuries to his back and underwent multiple surgeries.

On October 11, 2004, at about 3:15 p.m., Flores was driving 45 miles per hour in a dump truck on the I-5 freeway. He saw the traffic in front of him slowing, so he braked and slowed down. As he approached Perelmutter's Mercedes, Flores was unable to stop. The right front of the dump truck hit the left rear of the Mercedes at approximately 15 miles per hour. Perelmutter felt severe pain in his back. Officer Aranda responded to the scene and interviewed Flores and Perelmutter. Paramedics eventually arrived to extract Perelmutter from his Mercedes and take him to a hospital.

A couple of days later, Perelmutter went to see his doctor. After a series of visits and x-rays, Perelmutter was diagnosed with a fracture in his spine. In April 2005, Perelmutter had fusion surgery.

This action

Perelmutter sued Flores and Impex for negligence. Before trial, Perelmutter filed a motion to preclude evidence of his prior claims or lawsuits. The motion was initially denied without prejudice. Then, on the day of trial, the trial court ruled that "such evidence is barred unless sufficient foundation can somehow be laid [or] the door is opened." On a subsequent date, the trial court granted Perelmutter's motion in limine to exclude evidence of Flores's driving record. Additionally, the trial court ruled that the parties could not offer opinion evidence from Officer Aranda.[1]

As trial proceeded, there were four liability witnesses: Perelmutter, Officer Aranda, Flores, and a truck safety expert named Donald Asa (Asa). Portions of Flores's deposition were read into the record.

Regarding the October 11, 2004, accident, Perelmutter testified that he was driving in the same lane on the I-5 freeway for about five minutes. The traffic was moderate at first, then stop and go. While he was below an overpass and stopped for traffic, the rear of his Mercedes was hit by Flores's dump truck. According to Perelmutter, Flores was apologetic and said, "Look, the . . . truck was overloaded. I just couldn't stop. I didn't see the . . . people stopped. . . . When I saw them stopped, it was too late to stop. I just couldn't stop the truck." Flores admitted that he was responsible. He never accused Perelmutter of cutting him off. Perelmutter was asked if he changed lanes and cut Flores off. Perelmutter replied: "No. There's absolutely no possibility."

On cross-examination, Perelmutter testified that he had multiple surgeries before April 2005. They included a laminectomy, osteotomy, fusion, and surgery to his lumbar spine. There were times in his life that it was unsafe for him to drive. Neck pain made it difficult to observe traffic from the left and right, particularly when he made turns. He was asked if he had trouble changing lanes. He was not sure but thought that it "could be

---

[1] It is unclear when this order was entered. The parties did not provide a record citation. However, its existence is verified by the references to the order at various times in the proceedings.

a problem." In court, Perelmutter could not look back to his right without turning his shoulders.

Later, Perelmutter was asked to refresh his memory by looking at a deposition he took on August 31, 1999. After he looked at his deposition, he admitted to testifying that it was not safe for him to drive because of his back and neck. He testified that he could not turn his head because of cervical problems. Perelmutter was asked: "So it's your testimony that after you testified under oath in 1999 about the cervical problems and that you couldn't turn your head, later, at some point, you could, and then in court just a few days ago you couldn't again." Perelmutter answered: "Yes, sir, that's correct."

Next, Officer Aranda was called to the stand and testified: He observed damage to the left rear of the Mercedes. Based on memory, he believed that there was damage to the right front of the dump truck, and he believed there were tire marks indicating that the dump truck had swerved to the left. Flores stated that he was driving approximately 45 miles an hour in the third lane when he noticed that traffic was slowing. He applied his brakes but was unable to stop in time. As a result, he collided into the Mercedes. At no time did Flores did tell Officer Aranda that he had been cut off by Perelmutter merging into his lane.

On cross-examination, Officer Aranda testified that the traffic was stop and go, which suggested that the dump truck was traveling 20 miles per hour or less. The spot of the accident was "a tricky corner because it's a blind curve and people come in hot, and when they come right under that . . . [underpass], it's a dead stop. And this happens all the time."

Officer Aranda read from his police report. The reported stated that Flores claimed he was driving 45 miles an hour. Later, the report stated: "V-1 was traveling southbound on I-5, North of Triggs Street in the Number 3 lane . . . at approximately 15 miles per hour behind V-2." Officer Aranda was asked why there was a discrepancy regarding the speed. He replied: "This is opinions and conclusions. This is my opinion of how this collision occurred. . . . [B]ecause he stated he was going 45, he may have been going 45 earlier and that's what he stated. But based on the damage, I don't believe

he was going 45." If he had being going 45 miles per hour, the damage would have been massive.

On redirect examination, Officer Aranda was asked "if somebody is driving along at 45 miles an hour and they start to slow down," could the impact "have only occurred at 15 miles an hour[?]" Response: "That is possible." Next, Officer Aranda was asked if he formed a conclusion as to who caused the accident. The trial court sustained a defense objection. Perelmutter's counsel complained that the defense had read from the opinions and conclusions portion of the police report even though the trial court ruled that the evidence was precluded. Perelmutter's counsel argued that the door had been opened as to Officer Aranda's opinion. The trial court replied that Officer Aranda was "not qualified to give an opinion on the ultimate determination by the jury. The jury is determining fault or not. Even as an expert, [Officer Aranda] is not someone to give ultimate opinions on the ultimate issue in the case, so asking him who's at fault is not coming in."

The trial court went on to say the door was open and Officer Aranda could read the rest of his opinions and conclusions. The defense asked the trial court to exclude the portion of the report stating: "Due to P-1 driving at an unsafe speed, P-1 failed to notice traffic stopping ahead." The trial court rethought the matter and precluded Officer Aranda's opinion on the ultimate issue.

Perelmutter called Asa, who offered the following opinion: "My conclusions are that [Flores] was driving too fast for the . . . conditions of the traffic on that day, that . . . because he is following too close he doesn't have . . . the capability to stop in case something happens in front of him. He's too close to the vehicle. And, in fact, then something does happen, he attempts to stop, but he doesn't have the energy to stop in that quick a time. . . . [Flores] didn't have the knowledge based on what he should have had as to following distance, stopping distance and what the equipment's capability was."

The dump truck's registration was limited to 50,000 pounds. Flores broke the law by driving at 55,560[2] pounds.

On cross-examination, Asa testified that the accident occurred at 15 miles per hour. He did not measure the angle of the collision. Flores's attorney read a portion of Flores's deposition in which he stated that he had 100 feet of space in front of him while driving. Cars cut in and out of that space. According to Flores, he was traveling at 15 miles per hour. Just before the accident he was braking because the traffic had stopped. When he first saw Perelmutter, he was 25 feet away. Asa testified that if the dump truck was traveling at 15 miles per hour, then Flores would have needed 50 feet to stop. Subsequently, on redirect examination, Asa was asked how many feet Flores would need to stop if he was traveling 15 miles per hour and already braking. Answer: "No brake time, no perception, no reaction time, he can stop in 15 feet."

Asa further explained: "I have not reconstructed the accident. . . . I don't have anything except the testimony of [Flores], who certainly says that he couldn't stop, which means he's too fast."

Last, Flores took the stand.

He testified that he merged onto the I-5 freeway from the 101 freeway and the traffic was normal—cars were traveling about 50 or 60 miles per hour. He was driving 45 miles per hour, which was slower than regular traffic. The cars began to slow down near the exit for Atlantic Boulevard after the point where traffic merges from the 710 freeway. He downshifted. As he headed into a curve on the freeway, he was driving 15 to 20 miles an hour. He was in the third lane, looking to his left and behind. Suddenly Perelmutter's Mercedes came from the right, began moving in front of him and braked. Flores attempted to brake, but Perelmutter was too close and Flores did not have enough time to avoid a collision.

---

[2] The record is inconsistent as to the dump truck's weight. Sometimes the record states that it weighed 55,660.

In an excerpt from his deposition, read into the record, Flores testified that "I braked when I saw that car."

After the close of evidence, Perelmutter requested a negligence per se instruction. The trial court denied the request, stating: "At no time in the complaint has there ever been a theory of negligence per se pled in this case. Back in October, when jury instructions were required to be provided for the final status conference, there were no special jury instructions outlining this theory of the case, nor were there BAJI instructions provided . . . relating to negligence per se, which is BAJI instruction 34.45. [¶] Based upon the intricacies that would be involved here, it would be unfair because [Flores and Impex] were not given an adequate notice or opportunity to defend against this issue of the experts. [¶] This does not stop you, however, [Perelmutter's counsel], from arguing the following, that weight limits are designed to protect the highways and to protect other highway users from the hazard of vehicles which are less manageable by reason of overloading."

The parties gave their closing arguments. Defense counsel stated, inter alia: "[Perelmutter has] a number of problems. He's got fixation all up and down the spine, not just in one place. This is an easy way to pay for a surgeon, an easy way to pay for it: You know what? It's caused by accident. [¶] How do we know that is a pattern and practice in [Perelmutter's] life? I read it to you from some of his other testimony that he's given under oath. This is a pattern and practice with [Perelmutter]. He knows exactly what he's doing. He's well-practiced at it."

The jury deliberated and found that Flores and Impex were not negligent. Judgment was entered in their favor.

Perelmutter appealed.

The motion for new trial

Perelmutter moved for a new trial. He argued that Flores and Impex violated the trial court's orders by introducing evidence of Flores's driving record, eliciting opinion evidence from Officer Aranda, and introducing evidence of Perelmutter's prior personal

injury claims. Further, Perelmutter complained that the trial court failed to give a negligence per se instruction.

At the hearing, Perelmutter's counsel argued that Asa "testified that the accident could not have happened the way that [Flores] said it happened because if he had been traveling at the distance that he said . . . , his vehicle would have stopped in time and there never would have been a collision."

In response, the trial court stated: "I think we must have heard a different trial . . . because [Flores] testified that [Perelmutter's] car appeared out of nowhere and went into his lane and then went back and that he had tried to leave enough room and wasn't able to stop. The jury could have adopted that."

The trial court denied the motion. In ruling, in part, the trial court stated: When the defense cross-examined Officer Aranda, Perelmutter only objected once and on the basis of speculation, not on the basis that defense counsel was violating the trial court's prior ruling. Regardless, "sufficient evidence as to Officer Aranda's observations and conclusions regarding the cause of the accident was elicited by the entirety of his testimony on both direct and cross examination." The use of Perelmutter's depositions from prior personal injury actions occurred in two circumstances: "first, to refresh [Perelmutter's] recollection of his physical condition at certain times and secondly, to impeach him. Prior testimony may be used and is often the most reliable form of impeachment. Indeed, it is necessary to lay a foundation for the impeachment testimony by citing to the name of the action and cause in order to establish that it was the testimony of the witness. As the record herein reflects, defense counsel was cautioned and referred only to whether [Perelmutter] recalled testifying in another matter, without reference to the lawsuit or whether [Perelmutter] was suing in those prior lawsuits." Though defense counsel argued that Perelmutter lacked credibility because of a pattern and practice of being involved in other lawsuits, Perelmutter's counsel did not object. Had such an objection been made, and if Perelmutter's counsel had requested that the statement be stricken and the jury further instructed, "then there would have been no error, if indeed, there was one. Defense counsel's comments related to whether or not

[Perelmutter's] injuries were from this accident; reference to using his prior injuries to prove injuries herein is permissible argument when prefaced in the context of credibility."

Regarding the charge of instructional error, the trial court stated: "At no time, through many continuances, did [Perelmutter's] counsel request a negligence per se instruction. This occurred after the conclusion of testimony. As argued by [Flores and Impex], this prohibited him from presenting evidence to address this issue. Further, in considering whether an instruction on negligence per se is warranted, it must be first decided whether the injuries at issue resulted from an occurrence of the nature that the regulation was designed to prevent and whether the [Perelmutter] was one of the class of persons for whose protection the regulation was adopted. [Citation.] As was indicated in the hearing on this matter, per the legislative history and the text of the relevant vehicle code, the weight restrictions in the California Vehicle Code were adopted to avoid injury to the highways and bridges."

Finally, the trial court denied Perelmutter's request that it sit as a thirteenth juror and grant a new trial. The trial court explained that "[t]here was substantial evidence [to] support this jury's verdict that [Perelmutter] was the cause of the accident. There was also a failure of proof by [Perelmutter] to show that it was more likely to be true than not that [Flores] was the cause of the accident. The pictures of the accident damages, the testimony of Officer Aranda regarding the possible swerving of [Perelmutter's] vehicle to the left, and [Asa's] declination to 'reconstruct' the accident all add up to the viability of (and in support of) the jury's verdict."

Perelmutter appealed.

DISCUSSION

1. Based on the evidence, the jury was entitled to conclude that Flores was not at fault for the accident.

We must reverse the judgment if, as a matter of law, it cannot be said that there is substantial evidence to support it. (*Kiely Corp. v. Gibson* (1964) 231 Cal.App.2d 39, 47.) When we apply the substantial evidence standard of review, we resolve all conflicts in the evidence in favor of the prevailing party, and we draw all reasonable inferences in a manner that upholds the verdict. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) Substantial evidence is "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Ibid*.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id*. at p. 652.)

Perelmutter contends that the judgment must be reversed because the inescapable conclusion is that Flores was negligent. Upon reviewing the record, we conclude that the jury's finding must be honored.

When one motor vehicle collides into the rear of another, "negligence is a question of fact and not of law." (*Lowenthal v. Mortimer* (1954) 125 Cal.App.2d 636, 638.) Flores testified in his deposition that he had 100 feet between him and the next car while driving. Before he saw Perelmutter's Mercedes, Flores said he was traveling at 15 miles per hour. Officer Aranda and Asa opined that the collision occurred at 15 miles per hour, and Asa explained that a truck traveling at 15 miles per hour needed at least 50 feet to stop. In Flores's version of events, Perelmutter pulled in front of him and braked, giving Flores only 25 feet to stop. According to Flores, in his deposition, he braked when he saw the Mercedes. Under this scenario, the jury could have reasonably concluded that Flores was not at fault because Perelmutter gave him only half the distance necessary to stop. Perelmutter's task is to explain why this evidence does not support the judgment as a matter of law.

In essence, Perelmutter reargues his case by stating: (1) he testified that he was driving in the third lane of the I-5 freeway; (2) he was going to take the next exit; (3) he was in stop and go traffic; (4) he was hit from behind by Flores's dump truck; (5) Flores told Officer Aranda that he was driving 45 miles per hour, saw the traffic stopping ahead and applied his brakes but could not stop in time; (6) at the scene, Flores did not accuse Perelmutter of cutting him off; (7) Officer Aranda testified that there are many accidents in the same location because it is a sweeping blind curve; (8) Officer Aranda testified that this was not a swoop and swerve accident; (9) Flores testified in his deposition that at the point of the accident he had slowed down to 15 miles per hour, that his foot had already engaged the brake of his dump truck, and that he plowed straight into the back of Perelmutter's vehicle; (10) Flores's dump truck was overweight; (11) Asa testified that it was clear from Flores's deposition testimony that he did not have knowledge of the required stopping distances; and (12) Asa testified that the accident could not have possibly happened as Flores described because if he had been traveling at 15 miles per hour with the brake already engaged when he saw Perelmutter cut in 25 feet ahead, Flores would have been able to stop.[3]

Rebounding off favorable evidence, Perelmutter attempts to knock down Flores's trial testimony by claiming that it was so full of contradictions that the jury was not entitled to believe him as a matter of law.[4] In assessing this attack, we are mindful that

---

[3] Perelmutter identifies these facts on pages 35 and 36 of his opening brief. He did not provide record citations. We are not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. If a record citation is not provided for a particular point, it is waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

[4] Perelmutter contends that "the mass of contradictions between . . . Flores'[s] trial testimony, deposition testimony, and what he told [Officer Aranda] at the scene renders his trial testimony not credible, and thus not evidence of a substantial nature." But Perelmutter did not buttress this assertion with case law. It is the duty of appellant's counsel, not the courts, "'by argument and the citation of authorities to show that the

the "testimony of a witness offered in support of a judgment may not be rejected on appeal unless it is physically impossible or inherently improbable and such inherent improbability plainly appears." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.) Under this rule, there is no basis to reject Flores's trial testimony.[5]

Perelmutter complains that it was inconsistent for Flores to take all the blame at the scene of the accident and then, at trial, accuse Perelmutter of being at fault for causing the accident by cutting into Flores's lane. But his accusation was not physically impossible or inherently improbable. And the jury chose to believe him. It is axiomatic that we defer to the jury on issues of credibility. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

Next, we are asked to contemplate the meaning of Flores's testimony that he was traveling at 45 miles per hour, and then that he was traveling 15 miles per hour. The conclusion to be drawn from these portions of Flores's testimony is not spelled out for us. Presumably we are to perceive contradiction. But it is possible that Flores was traveling 45 miles per hour and then slowed to 15 miles per hour when he saw the traffic slowing in front of him. And even if the statements are contradictory, the jury could have still concluded that he was cut off by Perelmutter and was only driving 15 miles per hour at the time the dump truck hit the Mercedes. Indeed, Asa testified that the damage to the Mercedes indicated impact at 15 miles per hour.

The tertiary argument is this: "Here, even if we entirely credit [Flores's] trial testimony and ignore the fact that he told Officer Aranda at the scene, within a few minutes after the accident, that he was traveling 45 [miles per hour] and could not stop in

---

claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050 (*Sprague*).)

[5] Perelmutter complains that "in opposing a motion for summary judgment . . . Flores would not have been able to contradict his deposition testimony with a newly manufactured declaration." While this is true, it is irrelevant. This case comes to us following a jury trial.

time, that he never told Officer Aranda that [Perelmutter's] car swerved in front of him, and that he never told [Perelmutter] that [Perelmutter's] car . . . swerved in front of him, pursuant to the uncontradicted testimony of [Asa], the accident could not have happened in the manner [Flores] testified it . . . happened." The rule supplementing this argument provides: "So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted. [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633.) Additionally, "when the matter in issue is within the knowledge of experts only and not within common knowledge, expert evidence is conclusive and cannot be disregarded. [Citations.]" (*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 313.) In Perelmutter's view, the jury arbitrarily rejected Asa's expert opinion.

Why did the jury act arbitrarily? Perelmutter leaves us to guess. Impliedly he contends that if the jury believed that Flores was braking and going 15 miles per hour before he saw Perelmutter, the jury was required to accept Asa's opinion that Flores would have been able to stop within 15 feet and avoid the collision. If so, then the jury should have rejected Flores's testimony as impossible. But that was only if Flores already had the brake engaged. He never testified to that. At trial, Flores testified that he "tried to brake" once he saw Perelmutter. In his deposition he stated that before he saw Perelmutter he was braking to slow down, and also that he braked when he saw the Mercedes. It is possible that he braked to slow down, took his foot off the brake, and only then became aware of the impending collision. If that was true, Flores needed 50 feet to stop instead of 15 feet per Asa. Thus, it is possible that the jury accepted Asa's expert opinion regarding stopping distances but chose to believe that Flores did not have his foot on the brake at the moment that he saw Perelmutter cut in front of him. Believing that version of the events, and crediting Asa's opinion regarding stopping

distances, the jury could have concluded that Perelmutter did not leave Flores enough space to brake and avoid the collision.[6]

Continuing on, Perelmutter finds ammunition in the fact that the dump trunk was overweight. He contends that this fact, "standing alone, is enough to require a jury finding of at least some percentage of negligence attributable to [Flores and Impex]. Yet none was found by the jury." As to why, we are once again left to our imaginations. If Perelmutter tacitly argues that the jury was required to find that the dump truck's illegal extra weight contributed to the accident, we conclude that this tacit argument cannot prevail. No law was cited, and Asa testified that unless the brake was engaged, Flores needed 50 feet to brake. When giving this opinion, Asa was not asked if the extra weight changed his opinion. Suffice it to say, there is an inference that the extra weight would not have altered what transpired. If Flores's testimony is credited, as it must be, he had only 25 feet to spare. Even if the dump truck was not overweight, he would not have been able to stop.

2. The issue of whether the trial court should have given BAJI No. 34.45 was waived; any error was harmless.

Perelmutter asserts that the trial court should have given a negligence per se instruction because the gross weight permitted for the dump truck was 50,000,[7] the parties stipulated that at the time of the accident the dump truck weighed 55,560 pounds, and Asa testified that truck drivers are required to know their vehicle weights and how that weight affects stopping distances. But even assuming error, Perelmutter did not analyze why a reversal is required. Also, he failed to argue causation below and on appeal, so his argument lapsed.

---

[6] Perelmutter states that Asa offered uncontradicted testimony that "the accident could not have happened as described by . . . Flores." We have not been provided with a citation to the record verifying this statement. As a consequence, we decline to accept that Asa held this opinion.

[7] Weight limitations are set forth in Vehicle Code section 35551 et seq.

Taking issues in order of importance to our decision, we first turn to waiver and conclude that it preempts Perelmutter's position. Appellate precedent instructs that we presume that the judgment appealed from is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We adopt all intendments and inferences to affirm the judgment unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.) On appeal, an appellant bears the burden of showing that the trial court erred. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 ["It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record"].) As a corollary, "[i]t is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11 (*Alvarez*).) Unsurprisingly, when an appellant abdicates his responsibility to apply the relevant law to his case, an appellate court will not hesitate to find a waiver. (*Sprague*, *supra*, 166 Cal.App.3d at p. 1050.)

Perelmutter did not state the standard of review for instructional error cases, nor did he apply that standard. As a consequence of this observation, our duty to analyze instructional error comes to a close. Nonetheless, in the spirit of offering the parties a fuller picture of our thinking, we continue on.

Our Supreme Court has enlightened us with an apt précis. "[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

When reviewing a charge of instructional error, "we assume the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor. [Citation.] 'Accordingly, we state the facts most favorably to the party appealing the instructional error alleged, in accordance with the customary rule of appellate review. [Citation.]' [Citations.] [¶] Still, '[i]n a civil case an instructional

error is prejudicial reversible error only if it is *reasonably probable* the appellant would have received a more favorable result in the absence of the error. [Citations.]' [Citations.] . . . [¶] Hence, when evaluating the evidence to assess the likelihood that the trial court's instructional error prejudicially affected the verdict, we 'must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' [Citation.]" (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1087–1088.)

Upon consulting the negligence per se statute—*which Perelmutter did not cite*—we find that a breach of the duty of care is presumed if, among other things, a defendant violated a statute and the violation proximately caused injury. (Evid. Code, § 669, subd. (a)(1) and (2).) Perelmutter argues that "a negligence per se instruction was appropriate in this case. [Flores and Impex's] dump truck was admittedly 5,560 [pounds] overweight at the time of the accident, which, according to the uncontradicted testimony of [Asa] affected the handling and stopping distances of the vehicle." But herein lies a deficiency. Asa never testified that the dump truck's extra weight proximately caused the accident. Rather, viewing his testimony favorably, Asa merely opined that the extra weight increased the dump truck's stopping distance. By how much? Asa never said. He testified that Flores needed 50 feet to stop if he had not engaged the brake and 15 feet to stop if he had engaged the brake. Did these figures contemplate the extra weight? This answer is left wholly to surmise. What we do know is that Flores had 25 feet to stop and the jury apparently believed that he did not have the brake engaged and could not stop in time when Perelmutter cut in because a reasonably careful truck driver would have needed 50 feet to stop. Additionally, the jury impliedly found, given these facts, that Perelmutter was to blame. Assuming error for the sake of this opinion only, it was not reasonably probable that Perelmutter would have received a more favorable result if BAJI No. 34.45 had been given.

In his reply brief, Perelmutter argues for the first time that the dump truck's weight was a substantial factor in causing injury. He contends that, based on BAJI No. 34.45, "it would appear that negligence per se must be found even if the violation did

not cause the accident, but rather merely was a cause of injury." Next, he states that the only conclusion that can be drawn from Asa's testimony "is that either the accident would not have happened altogether or that the severity of the impact would have been lessened had . . . [the dump truck] not been overweight." In conclusion, he asserts: "Thus, even if the jury found that [Perelmutter] was at fault for cutting off [Flores and Impex], nevertheless as a matter of law [Flores and Impex] was also at fault for having an overweight vehicle, which by necessity increased the stopping distance . . . , thus causing [the dump truck] to plow into the back of [Perelmutter's] vehicle. Accordingly, as a matter of law [Flores and Impex] should have been found liable. At the very least, the jury should have been given a proper negligence per se instruction."

"'A point not presented in a party's opening brief is deemed to have been abandoned or waived. [Citations.]' [Citation.]" (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1.) Regardless, as we indicated, Asa did not suggest that the extra weight caused the accident. Also, Perelmutter did not properly evaluate the evidence to assess the likelihood that the trial court's alleged error prejudicially affected the verdict. He did not, for example, discuss the effect of other instructions, the effect of counsel's arguments, and any indications by the jury itself that it was misled. As a result, he did not show that it was reasonably probable he would have received a more favorable result in the absence of error.

As a parting comment, we align ourselves with the trial court's concern that giving the instruction would have been unfair to Flores and Impex. They were not on notice of the need to put on evidence regarding the impact, or lack thereof, of the extra weight on the events that transpired. Even so, the trial court allowed Perelmutter to argue that weight limits are designed to protect highways and motorists. Perelmutter's counsel, in closing argument, repeatedly reminded the jury that the dump truck was overweight. In the end, then, the jury was permitted, on a common sense basis, to consider the dump

truck's weight while deliberating. The trial court struck a balance in its rulings, and we will not be Monday morning quarterbacks.[8]

3. Perelmutter failed to demonstrate that the trial court's handling of Officer Aranda's opinion evidence is grounds for reversal.

On cross-examination, Flores and Impex elicited Officer Aranda's opinion that the collision occurred at 15 miles per hour. Subsequently, the trial court precluded Perelmutter from eliciting Officer Aranda's opinion that Flores did not notice traffic stopped ahead of him because he was traveling at an unsafe speed. Perelmutter contends that this was "simply unfair."

Because Perelmutter does not assign error to the trial court's ruling, we are not presented with an appellate issue. Thus, Perelmutter's contentions are moot.

Nonetheless, we acknowledge that there are three authorities cited by Perelmutter in his discussion of Officer Aranda's opinion evidence. The first authority, Evidence Code section 805, provides that "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of the fact." Next, Perelmutter cites *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702 [an expert opinion is not inadmissible merely because it coincides with an ultimate issue of fact] and *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1373 ["A product liability case must be based on substantial evidence establishing both the defect and causation (a substantial probability that the design defect, and not something else, caused the plaintiff's injury) and where, as here, the complexity

---

[8] At oral argument, Perelmutter argued that a negligence per se instruction was required by Code of Civil Procedure section 607a. This argument lacks merit. The statute provides that before commencement of the argument, "counsel may deliver to [the trial court] . . . additional proposed instructions to the jury upon questions of law developed by the evidence and not disclosed by the pleadings." (Code Civ. Proc., § 607a.) The trial court must then decide whether "to give, refuse, or modify the proposed instructions." (Code Civ. Proc., § 607a.) As we explained, a negligence per se claim was not developed by the evidence.

of the causation issue is beyond common experience, expert testimony is required to establish causation"]. But none of these citations establish when, even if there is error, a reversal is required. We are stuck, then, with the default presumption that the trial court's ruling was correct.

It bears commenting that Officer Aranda's testimony was consistent with that of Asa, Perelmutter's retained expert. Perelmutter can hardly be heard to complain that Flores and Impex gained an unfair advantage when Officer Aranda read part of his report. What he read was cumulative, i.e., his report opined, the same as Asa, that the collision occurred at 15 miles per hour.

Perhaps the more profound objection is that the jury did not get to hear Officer Aranda's assessment that Flores was traveling at an unsafe speed.

To canvas this point of contention takes but a moment. There is no need for expert opinion when "'"the jury is just as competent as the expert to consider and weigh the evidence and draw necessary conclusions."'" (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183.) This rules segues into the observation that even though opinion can embrace the ultimate issue, not all opinions embracing the ultimate issue are admissible. "In other words, when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them." (*Ibid*.) While Officer Aranda had pedigree above that of the jury to opine about collision speeds, the ultimate issue of whether Flores was traveling too fast and caused the accident was well within the jury's competence to decide based on logic and an assessment of the evidence. The trial court ruled within the boundaries permissible by precedent.

4. Perelmutter failed to demonstrate that reference to his depositions in prior actions or comments made during closing argument dictate reversal.

The trial court ruled that Flores and Impex could not introduce evidence of Perelmutter's claims and actions related to prior accidents unless a foundation was laid or the door was opened. Perelmutter suggests that Flores and Impex violated the trial court's order by reading from depositions in prior actions to pin down statements

Perelmutter made to his doctors, and by suggesting during closing argument that Perelmutter had a pattern and practice of suing. Perelmutter impliedly suggests that this constitutes grounds for reversal.

A cognizable theory has not been proffered. Perelmutter does not specifically accuse the trial court of error, and he has not cited the standard that should guide our review. Specifically, Perelmutter has not explained why it was inappropriate for the trial court to allow reference to prior deposition testimony to elicit details about Perelmutter's prior injuries. He does not argue, for example, that Flores and Impex failed to lay a foundation, or that the door was not opened. And he does not explain why the pattern and practice comment was reversible misconduct as opposed to a legitimate attack on Perelmutter's credibility. By failing to draw us an appellate roadmap to the destination he desires, Perelmutter waived his point.

Even if we wrestled with the issue without assistance from counsel, we would find a waiver from an alternative source.

Flores and Impex deny that they violated the trial court's order. They point to the following exchanges. When defense counsel proposed to read from Perelmutter's January 13, 1995, deposition, Perelmutter's counsel stated: "I don't have an objection to this going through former testimony. What I do have an objection to is in violation of your honor's ruling on the motion in limine announcing that it's a deposition from January 13, 1995. As your honor ruled, he can't bring up other claims in other lawsuits, though he can bring up other lawsuits. When he announces to the jury, this is a deposition from 1995, the jury knows that there was some lawsuit in 1995 in direct violation of your honor's ruling on the motion in limine." The trial court replied: "Well, I said if there wasn't a foundation laid. I don't think you need to mention it's a lawsuit. Just say in prior testimony. That's all you need to say. You don't have to mention the lawsuit." On another occasion, defense counsel stated that he wanted to refer to the deposition from August 31, 1999. The trial court asked Perelmutter's counsel if he had an objection. He averred: "No problem." When defense counsel referred to a December 7, 2005, deposition, Perelmutter's counsel once against stated: "No problem."

When a party agrees with what transpires at trial, the party cannot later object on appeal. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742–743.) Because Perelmutter's counsel expressed a lack of objection to readings from Perelmutter's prior deposition, this issue was waived. Aside from finding a waiver, we harbor doubts as to the merits of Perelmutter's contention because his physical limitations were relevant to whether he caused the accident, e.g., if he could not turn his neck, then changing lanes may have been hazardous. And his prior injuries would have been relevant to an apportionment of damages.

This leaves the comments made during closing argument. Perelmutter did not object. As a result, he cannot be heard to complain on appeal. (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184–185, fn. 1 ["it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial"].) To round off our observations, we point out that the California Constitution, Article VI, section 13, provides that no judgment shall be set aside on the ground of improper admission of evidence, or for any error as to a matter of procedure, unless an appellate court finds that the error resulted in a miscarriage of justice. Undeniably, Perelmutter did not analyze whether and why the California Constitution calls for a reversal.

5. Perelmutter failed to demonstrate that the trial court erred when it denied his motion for new trial.

Perelmutter's argument for reversal regarding the denial of his motion for a new trial is set forth in these two sentences: "Perelmutter's new trial motion is replete with a series of errors made by the trial court and improper tactics undertaken by [Flores and Impex] which undermined the jury's verdict. It is respectfully submitted that the totality of these errors and tactics require a reversal of this judgment." Because Perelmutter does not spell out the error of which he complains, he tacitly invites us to pen his appellate arguments. But, as established in *Alvarez*, we have no obligation to be a proxy for Perelmutter's counsel.

DISPOSITION

The judgment and denial of the motion for new trial are affirmed.

Flores and Impex shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD